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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JAMES HOUSTON, Defendant and Appellant.	B175646 (Los Angeles County Super. Ct. No. LA043568)

APPEAL from a judgment of the Superior Court of Los Angeles County, Martin L. Herscovitz, Judge. Reversed and Remanded in part; Affirmed in part.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc J. Nolan and Erin M. Pitman, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

An information charged defendant James Houston with petty theft with a prior conviction. (Pen. Code, § 666.)[1] Defendant elected to represent himself at trial.[2] The jury convicted him of petty theft. The court found true five previous convictions alleged pursuant to section 667.5, subdivision (b), including the conviction alleged pursuant to section 666. The court selected the upper term of three years on the conviction of petty theft with a prior and imposed one year for each of the prior convictions, resulting in an eight-year sentence.

On this appeal, defendant first contends his rights to due process and a fair trial were violated when one of the prosecution witnesses testified that defendant had told him that he (defendant) had previously been arrested for grand theft auto. We conclude any error that may have occurred was non-prejudicial in light of the overwhelming evidence of defendant's guilt. Defendant next contends that the trial court abused its discretion in failing to strike any of his prior convictions. We find the contention is not properly before us because defendant made no such motion in the trial court. Lastly, citing *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531], defendant contends the trial court erred in selecting the upper term. We agree and remand for resentencing.

STATEMENT OF FACTS

The theft occurred on July 21, 2003, at the Canoga Park Robinsons-May department store. Vincent Grashaw, a loss prevention agent, observed defendant on the store's closed circuit monitoring system. Defendant was in the jewelry

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1 All subsequent undesignated statutory references are to the Penal Code.

2 *Faretta v. California* (1975) 422 U.S. 806.

department. Defendant picked up three necklaces, rolled them up, and closed his fist around them as he looked around. Grashaw followed defendant into the men's restroom. Defendant stayed in a toilet stall for ten minutes. When he re-emerged, he was no longer holding the jewelry. Grashaw searched the stall but found nothing relevant to his investigation.

Grashaw followed defendant as he left the store. About 20 feet outside of the store, Grashaw stopped defendant and identified himself as a security agent. Grashaw told defendant to return the store's merchandise. Defendant denied taking anything. After Grashaw repeated his request several times, defendant pulled three gold necklaces from his shorts and handed them over. The price tags, totaling $190, were still attached to the jewelry.

Defendant was handcuffed and taken back into the store. A pat down search revealed a nail file and needle nose pliers. Lucy Bessell, the loss prevention manager, testified those were "the type of items that [she had] often seen be used by people who steal from the store in order to cut tags and things of that nature[.]" Because defendant failed to produce any identification, the police were called. Before they arrived, defendant tried to loosen his handcuffs and became involved in a profanity-laden screaming match with Bessell.

A videotape of defendant stealing the jewelry was introduced into evidence.

DISCUSSION

A. GRASHAW'S TESTIMONY ABOUT DEFENDANT'S PRIOR ARREST

Factual Background

During defendant's cross-examination of Grashaw, the following exchange occurred:

"Q. [Defendant] You testified that I became upset when I found out that you were going to call the police?

"A. [Grashaw] On the way back into the office you just didn't want us to call the police.

"You were saying, 'I just don't want to get the authorities involved.' And we -- we never really answered you.

"*You stated that* you -- you know, you were in a bad state, and that *you had been arrested before for grand theft auto*.

"And typically --

"THE DEFENDANT: Objection, Your Honor. Could you ask him to answer the question?

"THE COURT: He was.

"If you want to ask another question, go ahead." (Italics added.)

After the jury found defendant guilty, he filed a motion for a new trial. He attacked the above snippet of Grashaw's testimony, urging it violated the court's ruling that his prior conviction(s) would not be placed before the jury.

The court ruled:

"The next issue that you brought forward in your motion for mistrial is when the witness [Grashaw] testified that you said to him that you had previously been convicted of grant theft auto.

"You had not made an objection to that at the time. You did not make a motion to strike that issue [*sic*]. You did not move for a mistrial.

"The court could only decide at that point in the proceedings you were intending to testify. So, therefore, it was part of your trial

strategy to allow it at the time, knowing that testimony would come in as impeachment had you testified.

"So that is not grounds for a new trial."

Discussion

Defendant correctly notes that the trial court was mistaken when, in denying his new trial motion, it stated he had not objected to Grashaw's testimony about his prior arrest. Nonetheless, defendant, who had elicited the testimony by posing an open-ended question, did *not* move to strike the testimony nor did he ask the court to admonish the jury to disregard the testimony. In any event, any error was harmless given the overwhelming evidence of defendant's guilt. Grashaw testified he saw defendant take the jewelry and that when he later confronted defendant outside of the store, defendant returned the merchandise with the price tags still attached. In addition, a videotape of defendant stealing the jewelry was introduced into evidence, a fact the trial court noted several times in ruling upon the new trial motion.[3] Given this record, it is not reasonably probable a result more favorable to defendant (acquittal of petty theft) would have occurred in the absence of the alleged error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

B. MOTION TO STRIKE PRIORS

Factual Background

The information alleged five felony convictions: 1995 and 1997 convictions for joyriding (Veh. Code, § 10851, subd. (a)), a 1999 conviction for possession of a

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[3] At one point, the court told defendant that Grashaw's testimony was "corroborated by the videotape that shows you stealing the items." At another point, the court stated: "[T]he evidence that you stole the necklace[s] from Robinsons-May was both overwhelming and was corroborated by the evidence in the videotape."

controlled substance (Health & Saf. Code, § 11377), a 2000 conviction for petty theft with a prior (§ 666), and a 2001 conviction for burglary (§ 459). These five convictions were all based upon guilty pleas.

After the jury found defendant guilty of petty theft, a court trial was had on the prior convictions. A section 969b packet was introduced into evidence and a fingerprint expert testified.

The court ruled:

> "The court has fully reviewed all the five priors under 667.5 subdivision (b) and 1203 (e)(4).
>
> "The court finds beyond a reasonable doubt that each of those prior felony convictions as listed on the information, number one, is true, and, number two, each resulted in state prison terms.
>
> "Further, that five years did not elapse between the conviction dates for any of them.
>
> "So they were all separate prison terms within the meaning of Penal Code section 677.5 subdivision (b), where the defendant did not remain free for more than five years between any of them, and between the last one and the instant offense.
>
> "So the court finds all the priors to be true."

Pursuant to defendant's request, sentencing was continued so that he could obtain the transcripts of the five cases to show that he "wasn't given [his] *Boykin* and *Tahl* rights" before he had pled in those proceedings.

Thereafter, defendant filed a motion to strike his prior convictions. He contended the convictions were constitutionally infirm as being "a result of an involuntary plea." He did not ask the court to exercise its discretion (§ 1385) to strike any of the prior convictions.

Following a hearing on the motion, the court ruled:

"In the one case that does not have a transcript of the plea, looking at the minute order of April 24th, 1995, when you were represented by counsel, by a deputy public defender Charlton, the court found that you personally waived your right to jury trial and court trial; found that you were advised and personally waived your right of confrontation, cross-examination, privilege against self-incrimination, and were advised of the possible effects of the plea, and that you entered a plea of guilty to that charge.

"Having reviewed the transcripts on all of the pleas on all of the other cases that are alleged under 667.5 subdivision (b), the court finds that there were knowing and intelligent waivers of your constitutional rights, also.

"So your motion to strike the priors on the grounds that you raised are denied."

Discussion

Pursuant to section 1385, subdivision (a), the trial court has the power to strike a prior conviction alleged under section 667.5, subdivision (b). (See, e. g., *People v. Bradley* (1998) 64 Cal.App.4th 386, 391.) Based upon that principle, defendant contends that "the trial court abused its discretion when it refused to strike any of [his] five prison term priors." This contention is not properly before us because no such motion was made below, a point the Attorney General has overlooked. Defendant moved only to strike his prior convictions based upon the claim the priors were constitutionally infirm. Defendant never asked the court to exercise its discretion under section 1385 to strike one or more of the prior convictions. Defendant is therefore precluded from raising on appeal the contention that the court abused a discretion it was never asked to exercise. (See *People v. Carmony* (2004) 33 Cal.4th 367, 375-376.)

C. DEFENDANT'S SENTENCE

Factual Background

After reviewing the probation report, the court ruled:

"The court finds the following aggravating circumstances:

"One, his past performance on probation and parole has been unsatisfactory.

"First of all, probation is denied.

"He has been on probation and parole several times, and he has hardly ever successfully completed probation.

"Then in looking at the sentence, the sentencing range is sixteen months, two, or three years for petty theft with a prior.

"The court finds the following aggravating circumstances:

"One, he has not shown willingness to comply with conditions of probation in the past -- strike that.

"The manner in which the crime was committed indicates planning and sophistication.

"The defendant was found with a tool to remove any security devices on the items that were to be stolen from Robinsons-May. Therefore, he had obviously planned to do this theft before.

"Also in looking at the videotape, the defendant is obviously trying to walk around the store, go in and out of the bathroom, in order to avoid detection.

"Notwithstanding his commitments to state prison, in looking at his other sentences that he received in the states of New Mexico, Oklahoma, and Arizona, he has shown a pattern of conduct that are numerous.

"And although his past performance on probation or parole was unsatisfactory in one case, which would be the basis for denying probation, then the eleven other cases, his performance on probation or parole was also unsatisfactory, which is an additional aggravating factor.

"There are no mitigating factors.

"Therefore, the court imposes the high term on count 1 of three years."

Discussion

Blakely v. Washington, supra, 542 U.S. ___ (*Blakely*) builds on the following holding from *Apprendi v. New Jersey* (2000) 530 U.S. 466: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490.) In *Blakely*, the United States Supreme Court explained that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation] [so that] the judge exceeds his proper authority." (124 S.Ct. at p. 2537.)

Under the California determinate sentencing law, a sentencing court must impose the middle term unless it finds there are factors in mitigation or aggravation. Only where factors in aggravation are found to exist may the court impose the upper term. (§ 1170, subd. (b).)

The issue is whether *Blakely, supra,* means that the upper term can be imposed only if the jury finds the factors in aggravation to be true.

The Attorney General's preliminary argument that the contention has been waived by failure to object in the trial court lacks merit for the reasons we explained in *People v. Vaughn* (2004) 122 Cal.App.4th 1363, 1369 [review granted Dec. 15, 2004].

With regard to sentencing a defendant to the upper term, we reject the Attorney General's contention that *Blakely* is inapplicable because California's sentencing scheme is sufficiently distinguishable from the state statutory scheme reviewed by the *Blakely* court. Our reasons for this conclusion are set forth in detail in our recent opinion in *People v. White* (2004) 124 Cal.App.4th 1417, 1434-1439 [petns. for review pending]. Simply stated, imposition of the upper term does require fact finding by the jury.

Nor do we agree with the Attorney General that we can apply a harmless error analysis to the *Blakely* violation. He advances two arguments in that regard.

The first argument is based upon the general principle that a single factor is sufficient to support imposition of the upper term. (See, e. g. *People v. Osband* (1996) 13 Cal.4th 622, 728.) The Attorney General argues such a result can be justified by holding that the single aggravating factor of defendant's recidivist criminal history[4] falls outside the scope of *Blakely*. The problem with this approach is that the trial court gave multiple reasons for its decision to impose the upper term: the manner in which the crime was committed, defendant's unsatisfactory performance on probation and parole, and the numerosity of his

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[4] A sentencing court can rely upon a defendant's prior convictions or his probationary status at the time of the charged offense to impose the upper term without running afoul of *Blakely*. (See, e. g., *People v. Vu* (2004) 124 Cal.App.4th 1060, 1067-1069 [review granted Feb. 16, 2005].)

prior convictions. As we explained in *People v. White, supra,* "[t]he relevant question is not whether we can conceive of a legitimate way for the trial court to have arrived at the . . . sentence imposed on appellant. The question is whether the trial court would have exercised its discretion to impose the upper term" if it knew of *Blakely's* constraints. (*Id.* at p. 1439.) On this record, we can not conclude it would have.

Secondarily, the Attorney General argues that "every one of the trial court's reasons for imposing the upper term were observations drawn from largely uncontested or overwhelming evidence [so that] the jury would have found each of these aggravating circumstances true beyond a reasonable doubt had they been presented." However, the point of *Blakely* is that a jury trial must be held. (See, e.g. *People v. Lemus* (2004) 122 Cal.App.4th 614, 622, review granted Dec. 1, 2004, S128771.)

We therefore reverse the sentence and remand for re-sentencing.

DISPOSITION

The judgment is reversed as to the sentence only, and the matter is remanded for the court to conduct a new sentencing determination pursuant to *Blakely v. Washington, supra,* 542 U.S. ___. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED

HASTINGS, J.

I concur: EPSTEIN, P.J.

GRIMES, J., Concurring and Dissenting.

I concur in parts A and B of the majority opinion. Respectfully, I dissent with respect to the disposition and discussion in part C, which addresses the issue of whether *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*) mandates reversal of the upper term imposed on appellant's conviction for petty theft with a prior conviction and remands for resentencing on that count.

My colleagues conclude that imposition of the upper term requires fact finding by the jury, and that it is unknown whether the trial court would have exercised discretion to impose the upper term if it had known of *Blakely*'s constraints. Until our Supreme Court concludes otherwise,[1] I am of the opinion that *Blakely* does not apply to the tripartite prison scheme (upper, middle, and low term) of the California determinate sentencing law (Pen. Code, § 1170, subds. (a)(3) & (b); see also, Cal. Rules of Court, rules 4.420(a)-(c), 4.421 & 4.423). It is my view that our California sentencing scheme is the type of discretionary sentencing within a range authorized by law to which *Blakely* does not apply.

In view of the foregoing, I would affirm the trial court's imposition of the upper term on appellant's conviction of petty theft with a prior conviction.

GRIMES, J.*

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[1] The issue of whether *Blakely* applies to the upper term choice is pending before our Supreme Court in *People v. Black*, S126182 and *People v. Towne*, S125677.

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.